

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals,
Owens, P.J., Murphy, and Hoekstra, J.J.

TERIDEE LLC, a Michigan Limited liability
company; THE JOHN F. KOETJE TRUST,
u/a/d 5/14/2987, as amended; and, THE DELIA
KOETJE TRUST, u/a/d 5/13/1987, as
amended;

Plaintiffs/Appellees,

v

CLAM LAKE TOWNSHIP, Michigan
Municipal corporation; and HARING
CHARTER TOWNSHIP, a Michigan
Municipal corporation,

Defendants/Appellants.

Supreme Court Docket No. 153008

Court of Appeals No. 324022

Wexford County Circuit Court
Case No. 13-24803-CH

**AMICUS CURIAE BRIEF OF THE MICHIGAN TOWNSHIPS
ASSOCIATION IN SUPPORT OF THE APPELLANTS CLAM LAKE TOWNSHIP AND
HARING CHARTER TOWNSHIP**

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STATEMENT OF JURISDICTION

On December 8, 2015, the Court of Appeals issued a per curiam opinion in this case.¹ On April 6, 2016, this Honorable Court issued an Amended Order granting leave to appeal². In its Order, this Honorable Court directed that, “[t]he parties shall include the issues to be briefed: (1) whether *Inverness Mobile Home Community v Bedford Twp*, 263 Mich App 241 (2004), applies to the defendant townships’ Agreement pursuant to the Intergovernmental Conditional Transfer of Property by Contract Act, 1984 PA 425, MCL 124.21 *et seq.* (Act 425); (2) if so, whether the challenged provisions of the 425 Act Agreement were nevertheless authorized by Section 6(c) of Act 425, MCL 124.6(c); and (3) if the challenged provisions are void, whether the offending provisions of the defendant townships’ Act 425 Agreement were severable.” This amicus brief is submitted by Amicus Curiae Michigan Townships Association pursuant to MCR 7.312(H).

¹ *Teridee, LLC, John F. Koetje Trust and Delia Kotje Trust v Charter Township of Haring and Township of Clam Lake*, unpublished Court of Appeals, issued 12/8/15, Docket No. 324022 (Court of Appeals Opinion).

² *Teridee, LLC v Haring Charter Township and Claim Lake Township*, 499 Mich 896; 876 NW2d 824 (2016).

STATEMENT OF QUESTIONS PRESENTED

WHETHER *INVERNESS MOBILE HOME COMMUNITY V BEDFORD TWP*, 263 MICH APP 241 (2004), APPLIES TO THE DEFENDANT TOWNSHIPS' AGREEMENT PURSUANT TO THE INTERGOVERNMENTAL CONDITIONAL TRANSFER OF PROPERTY BY CONTRACT ACT, 1984 PA 425, MCL 124.21 *ET SEQ.* (ACT 425).

The Michigan Court of Appeals answered: "Yes".

Appellees answered: "Yes".

Township Appellants answered: "No".

Amicus Curiae answers: "No".

WHETHER THE CHALLENGED PROVISIONS OF THE 425 ACT AGREEMENT WERE NEVERTHELESS AUTHORIZED BY SECTION 6(C) OF ACT 425, MCL 124.6(C).

The Michigan Court of Appeals answered: "No".

Appellees answered: "No".

Township Appellants answered: "Yes".

Amicus Curiae answers: "Yes".

WHETHER THE OFFENDING PROVISIONS OF THE DEFENDANT TOWNSHIPS' ACT 425 AGREEMENT WERE SEVERABLE IF THE CHALLENGED PROVISIONS ARE VOID.

The Michigan Court of Appeals answered: "No".

Appellees answered: "No".

Township Appellants answered: "Yes".

Amicus Curiae answers: "Yes".

STATEMENT OF FACTS

Amicus Curiae, Michigan Townships Association, concurs with and hereby adopts the Statement of Facts as contained in the Appellants' Brief on Appeal and the Reply to Appellees' Counterstatement of Facts as contained in Appellants' Reply Brief.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Michigan Townships Association (MTA) is a Michigan non-profit corporation whose membership consists of in excess of 1,235 townships within the State of Michigan joined together for the purpose of providing education, exchange of information and guidance to and among township officials to enhance the more efficient and knowledgeable administration of township government services under the laws of the State of Michigan. The MTA, established in 1953, is widely recognized for its years of experience and knowledge with regard to municipal issues. Through its Legal Defense Fund, the MTA has participated on an amicus curiae basis in numerous state and federal cases presenting issues of statewide significance to Michigan townships. The amicus curiae brief in this matter is authorized by the MTA to edify and assist this Honorable Court's consideration of the important issues presented in this case. Pursuant to Michigan Court Rule 7.312(H)(2), the MTA consists of “an association representing a political subdivision”.

Amicus Curiae strongly concurs with the granting of leave in this case as the questions presented are of major statewide significance to local units of government by impacting their ability to effectively enter into intergovernmental conditional transfers of property contracts for economic development as provided for in Public Act 425 of 1984 (MCL 124.21 *et seq*; also referred to herein as “PA 425”).³ Contracts entered into under PA 425⁴ are one of the most powerful tools for economic development available to local units and are commonly used throughout the State. 425 agreements allow for the conditional transfer of jurisdiction over a property from one local unit to another and typically permit the sharing of governmental

³ A local unit is defined in MCL 124.21(b) “as a city, township, or village”. Local units are impacted alike as two or more are statutorily authorized to enter into an intergovernmental conditional transfer of property contract. MCL 124.22(1).

⁴ Also referred to herein as 425 agreements.

functions, services, and taxes within the transferred area so that the economic development project will have appropriate sewer and water service, fire and police protection, zoning controls and other needed infrastructure, and ordinance protections. By its very nature a 425 agreement transfers legislative functions from one unit to another and contractually binds future boards to the provisions of the 425 agreement for up to one-hundred years.⁵ In all cases, the local units' legislative authority must be bound by the contract to carry out the economic development purposes of the 425 agreement; otherwise there would be no agreement and the transfer would be meaningless.

The impact of the rule from *Inverness Mobile Home Community, Ltd v Bedford Township*, 263 Mich App 241; 687 NW2d 869 (2004) providing that a township board may not contract away its legislative powers⁶ provides for an interesting legal review but on closer inspection it is clearly not applicable in the case at bar. The reasoning regarding this finding is straightforward and logical. It begins with an understanding of the power of the Michigan Legislature and ends with an understanding that the general rule in *Inverness* is altered by PA 425.

Simply put, the State Legislature has plenary legislative authority unless limited by the electors through the United States Constitution or the Michigan Constitution of 1963.⁷ This authority allows the State to pass legislation regarding local legislative authority such as zoning or police powers unless prohibited by the Constitution. The Michigan Constitution even encourages legislation that allows for contractual provisions between governmental entities that

⁵ 425 Agreements can last for a period up to 50 years, plus renewal periods not to exceed another 50. MCL 124.22.

⁶ *Inverness*, *supra*, 248.

⁷ *Attorney General ex rel. O'Hara v Montgomery*, 275 Mich 504, 538; 267 NW2d 550 (1936).

transfers or shares their governmental functions and authority.⁸ PA 425 appears to be a legislative implementation of this constitutional authority in addition to an exercise of the State's plenary powers to legislate in an attempt to encourage economic development.

Additionally, PA 425 is to be liberally construed in favor of the local units and includes those powers fairly implied to carry out its economic development purpose.⁹ This carries with it the broad power to bind boards to the 425 agreement terms for development in the transferred area. PA 425 also specifically provides that the local units may contract terms regarding "the adoption of ordinances and their enforcement".¹⁰ This certainly supports the alteration of the *Inverness* rule as ordinance adoption is a legislative function and specifically an allowed term of the 425 agreement.

Finally, if for some reason, the restriction on Haring Charter Township's zoning authority in the 425 Agreement is found unlawful then the parties clearly understood the risk and specifically provided that the Agreement still be enforceable pursuant to the severance provision in Section 2(d) of the 2nd Amended Agreement for Conditional Transfer.¹¹ The parties can still carry forward the economic development intent even if the provision controlling zoning regulations are struck. Haring Charter Township can just zone the transferred property appropriately to carry out the intended development project.¹²

The holding in *Inverness* was never intended to usurp the plain language of PA 425. Amicus Curiae is confident that when this Honorable Supreme Court reviews the relevant

⁸ Michigan Constitution of 1963 Article 7 Section 28

⁹ Michigan Constitution of 1963 Article 7 Section 34.

¹⁰ MCL 124.26(c). Zoning is by ordinance as provided for generally under the Michigan Zoning Enabling Act, PA 110 of 2006; MCL 123.3101 et seq.

¹¹ Appellant's Appendix, page 480a-485a.

¹² In fact, the property already has been zoned properly by Haring Charter Township for the economic development project. Appellants' brief on appeal page 42.

Constitutional provisions, statutory language, and the arguments herein, jurisprudence on this issue will be set right and the Court of Appeals Opinion in this matter reversed.¹³

ARGUMENT

1. *INVERNESS MOBILE HOME COMMUNITY V BEDFORD TWP*, 263 MICH APP 241 (2004), DOES NOT APPLY TO THE DEFENDANT TOWNSHIPS' AGREEMENT PURSUANT TO THE INTERGOVERNMENTAL CONDITIONAL TRANSFER OF PROPERTY BY CONTRACT ACT, 1984 PA 425, MCL 124.21 *ET SEQ.* (ACT 425)

A. STANDARD OF REVIEW

Issues addressed herein involve questions of constitutional and statutory interpretation which are reviewed de novo.¹⁴

B. INTRODUCTION¹⁵

This case focuses on Appellants' conditional transfer of property via a 425 agreement that transfers contiguous land (hereinafter the "Transferred Area") from the jurisdiction of Clam Lake Township to the jurisdiction of Haring Charter Township (hereinafter collectively referred to as the "Townships") for 20 years. The purpose of this transfer is to build an economic development project in the Transferred Area consisting of construction of water and sewer infrastructure and residential/commercial mixed use development. It is undisputed that Appellee was not a party to the Townships' 425 Agreement (hereinafter the "Agreement"). The Townships entered into the Agreement which dictated, among other things, the transfer of zoning jurisdiction requirements for the Transferred Area.

¹³ Amicus Curiae fully supports the excellent arguments of Appellants in the Application for Leave to Appeal and the Appellants' subsequent Reply Brief and through the arguments herein attempts to not be repetitious with such arguments.

¹⁴ *Associated Builders & Contractors v. City of Lansing*, 499 Mich 177, 183; 880 NW2d 765 (2016).

¹⁵ See also introductory comments contained in the Statement of Interest of Amicus Curiae, *supra*, to be incorporated herein.

The Townships' Agreement notes that the Transferred Area was zoned by Wexford County as a Forest Recreational (hereinafter "FR") zoning district because a portion of the same was partly used for residential purposes.¹⁶ The Agreement required that the FR zoning district remain in effect until Haring Charter Township amended its zoning ordinance to a district that is comparable to the existing County FR zoning district for the portion of the Transferred Area that is used, in part, for residential purposes.¹⁷ The Agreement further required, that

"[t]he balance of the Transferred Area that is currently undeveloped shall be rezoned, upon application of the property owner(s), to a planned unit development ("PUD") district that permits mixed commercial/residential use; provided however, that Haring shall not consider a PUD rezoning application for this portion of the Transferred Area until (i) it has adopted provisions in its zoning ordinance that allow mixed-use commercial/residential PUDs, and which require that such PUDs comply with the following minimum requirements...".¹⁸

Amicus Curiae agrees with the general rule set forth in *Inverness*, holding that "while a township board may, by contract, bind future boards in matters of business of proprietary nature, a township board may not contract away its legislative powers."¹⁹ It is undisputed that zoning is a legislative function.²⁰ Amicus Curiae contends, however, that the *Inverness* holding is a general rule and a township board may contract away a future board's legislative authority if it is authorized to do so by law. The State's plenary authority allows for such legislation and there is nothing in the Michigan Constitution of 1963 that prohibits the same. In fact, the Michigan Constitution of 1963 contains provisions that support the enactment of PA 425 and allows the contracting away of legislative powers. PA 425, by its very nature, and as specifically authorized by its plain language, binds future boards by contract to a certain economic development plan in

¹⁶ Appellants' brief on appeal, page 7, Section 6a. Clam Lake Township does not have its own zoning and instead falls under County zoning.

¹⁷ Appellants' brief on appeal, page 7-6 Section a(1).

¹⁸ Appellants' brief on appeal, pages 7-18.

¹⁹ *Inverness*, *supra*, 248.

²⁰ *Schwartz v City of Flint*, 426 Mich 295, 309; 395 NW2d 678 (1986).

the Transferred Area and with regard to those legislative functions necessary to carry out the development in this area (i.e. it must be zoned properly, among other things).²¹ The agreement can go up to fifty years and then be renewed for up to another fifty years.²² The following analysis of the state's authority, the Michigan Constitution, PA 425 and the *Inverness* case leads inextricably to the conclusion that *Inverness* provides a general rule that does not control the specific authority granted in PA 425.

C. THE STATE HAS PLENARY AUTHORITY TO ENACT LEGISLATION THAT AUTHORIZES TOWNSHIPS TO CONTRACT AWAY A FUTURE BOARD'S ZONING AUTHORITY.

In addressing the legislative authority of this State, the Michigan Supreme Court in *Attorney General ex rel. O'Hara v Montgomery*, 275 Mich 504, 538; 267 NW2d 550 (1936) stated that,

“The legislative authority of the state can do anything which it is not prohibited from doing by the people through the Constitution of the State or of the United States.”

This unequivocally recognizes the plenary power of the State's legislative authority within Constitutional limits. There is nothing in the Michigan Constitution that would put a limit on the State's legislative authority to authorize townships or other local units from contractually binding their boards' legislative authority with regard to zoning or otherwise for the purposes of economic development.²³ In fact, Article 7, Section 28 of the Michigan Constitution of 1963

²¹ PA 425 is an example of the exercise of the State's plenary authority in its desire to promote economic development.

²² MCL 124.21.

²³ Zoning authority is provided to local units by legislation contained in the Michigan Zoning Enabling Act, *supra*. The Legislature can certainly pass other legislation (i.e., PA 425) that allows local units to make binding contracts with one another with regard to ordinances, including zoning. Zoning is but one type of ordinance as there are also police power ordinances such as provided for in MCL 41.181 and MCL 42.15.

(Article 7, Section 28) encourages legislation for the sharing and transferring of functions in providing that:

“The legislature by general law shall authorize two or more counties, townships, cities, villages or districts, or any combination thereof among other things to: enter into contractual undertakings or agreements with one another or with the state or with any combination thereof for the joint administration of any of the functions or powers which each would have the power to perform separately; share the costs and responsibilities of functions and services with one another or with the state or with any combination thereof which each would have the power to perform separately; transfer functions or responsibilities to one another or any combination thereof upon the consent of each unit involved; cooperate with one another and with state government; lend their credit to one another or any combination thereof as provided by law in connection with any authorized publicly owned undertaking.” (emphasis added)

The plain language of Article 7, Section 28 encourages municipalities to work together and coupled with the powers granted in PA 425 allows them to solve economic development problems. This broad and powerful constitutional language requires implementation by the legislature. The Constitutional Convention comment to Article 7, Section 28 provides in part that:

“This is a new section designed to encourage the solution of metropolitan problems through existing units of government rather than by creating a fourth layer of local government. Local governments are allowed to join in a variety of ways to work out together the solutions to their joint problems.

This is to be done by agreement of the units of government involved and no unit will be compelled to enter into any agreement. Possible abuses are prevented by providing overall control by general acts of the legislature.”

PA 425 is a shining example of legislation intended to carry forward this constitutional concept by providing for a cooperative approach to solving local problems. As we will see in the following sections, PA 425 plainly provides for the binding of future boards’ legislative and ordinance authority in a transferred area for desired economic development projects.

Additionally, it is important to note that Article 7, Section 34 of the Michigan Constitution of 1963 provides that:

“[t]he provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor. Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution.”

This constitutional provision of fairly implied powers and liberal construction in favor of the Townships as applied to Article 7, Section 28 and PA 425 makes it readily apparent that Townships can use PA 425 to cooperatively create a contractual relationship between the parties designed to meet their needs for economic development in transferred areas. This contract necessarily contains provisions regarding transfers of legislative functions and will in almost all cases require certain zoning to be created or maintained to further the project.

D. PA 425 PROVIDES AUTHORITY TO CONTRACTUALLY BIND THE LEGISLATIVE AUTHORITY OF LOCAL UNITS.

PA 425 provides a comprehensive scheme for the conditional transfer of the jurisdiction of property for economic development purposes. PA 425 allows two or more cities, townships, or villages to conditionally transfer property by written contract for a period of not more than 50 years (plus renewal periods not to exceed 50 years) for the purpose of an economic development project.²⁴ By its plain language, PA 425 allows contracting local units to bind future boards to the provisions contained within the contract for up to 50 years at a time. PA 425’s binding by contract is a unique deviation from the general rule preventing the contracting away of legislative authority and can only be invoked for economic development projects.

Under MCL 124.21 defines economic development projects as follows::

“Economic development project” means land and existing or planned improvements suitable for use by an industrial or commercial enterprise, or housing development, or the protection of the environment, including, but not limited to, groundwater or surface water. Economic development project includes necessary buildings, improvements, or structures suitable for and intended for or incidental to use as an industrial or commercial enterprise or housing

²⁴ MCL 124.22.

development; and includes industrial park or industrial site improvements and port improvements or housing development incidental to an industrial or commercial enterprise; and includes the machinery, furnishings, and equipment necessary, suitable, intended for, or incidental to a commercial, industrial, or residential use in connection with the buildings or structures.” (Emphasis added)

The plain language above, or at the very least as liberally construed, covers the Townships’ proposed purposes in entering into the 425 Agreement for sewer and water utility construction and residential/commercial mixed use. A great deal of consideration by the local units goes into a 425 Agreement. When formulating a contract, cities, townships, or villages must consider a number of specific factors including, among other things, population density; land area and land uses; valuations; past and probable future growth; cost and adequacy of governmental services in the area to be transferred; the probable future needs for services; the probable effect of the proposed transfer; the probable change in taxes and tax rates in the area to be transferred in relation to the benefits expected; and the financial ability of the local unit responsible for services in the area to provide and maintain those services.²⁵

With regard to the written content itself, MCL 124.26 provides that a contract may contain any of the following if applicable:

- “(a) Any method by which the contract may be rescinded or terminated by any participating local unit before the stated date of termination.
- (b) The manner of employing, engaging, compensating, transferring, or discharging personnel required for the economic development project to be carried out under the contract.
- (c) The fixing and collecting of charges, rates, rents, or fees, where appropriate, and the adoption of ordinances and their enforcement by or with the assistance of the participating local units.
- (d) The manner in which purchases shall be made and contracts entered into.
- (e) The acceptance of gifts, grants, assistance funds, or bequests.
- (f) The manner of responding for any liabilities that might be incurred through performance of the contract and insuring against any such liability.
- (g) Any other necessary and proper matters agreed upon by the participating local units.” (Emphasis added)

²⁵ MCL 124.23.

As will be discussed in the subsequent argument, MCL 124.26(c) clearly provides the authority to contract regarding the adoption of ordinances. This would naturally include a zoning ordinance or any other type of ordinance (for example, a fire run charge ordinance under MCL 41.806a). MCL 124.26(c) naturally binds the local units to such contractual terms regarding ordinances for up to 50 years at one time. Additionally, MCL 124.26 (especially (g)) highlights the broad scope of terms that the local units can agree upon and the overall broad scope of PA 425 to effectuate the economic development. Obviously, economic development is very important to the State and its importance is reflected by this broad grant of authority.

MCL 124.28 addresses the jurisdiction over transferred property and provides:

“Appellants’ Appendix, page 480a-485a provides otherwise, property which is conditionally transferred by a contract under this act is, for the term of the contract and for all purposes, under the jurisdiction of the local unit to which the property is transferred.” (Emphasis added)

This section provides the local unit’s broad authority to contract for less than all jurisdiction to be transferred. The onus is on the contracting local units to determine the relevant parameters of the agreement when negotiating the conditional land transfer pursuant to PA 425.

The purpose of these provisions is to allow the contracting local units to set the parameters contained within their 425 agreement that they determine are necessary to achieve the economic development project. Clearly, a transferee local unit needs to zone the transferred property so the same is not un-zoned. Further, it must be zoned to allow for the desired development. Amendments to the transferee’s zoning ordinance may also be required to achieve the proposed economic development project. Zoning parameters are appropriate in the 425 agreement to assure the transferred property will be zoned and used for the proposed economic development project. PA 425 is a mechanism for economic development that allows for a

cooperative voluntary contract that may bind a future board's legislative authorities. Therefore, as will be further discussed as follows, PA 425 is an exception to the general rule held in *Inverness*.

E. *INVERNESS MOBILE HOME COMMUNITY V BEDFORD TWP*, 263 MICH APP 241 (2004) DOES NOT APPLY TO THE TOWNSHIP'S ACT 425 AGREEMENT.

The Court in *Inverness* ruled that paragraphs 10-13 of a consent judgment were void because the "limitations on the amendment of the master plan constitute an improper infringement of the legislative authority of a future township board."²⁶ This finding is not applicable to the Township's 425 Agreement as the following analysis clearly demonstrates.

In 1993, the *Inverness* plaintiff, a mobile home community, sought rezoning of an 11-acre parcel of vacant land from RM-1, multiple family residential district, to MHP, a mobile home park district.²⁷ The purpose of this expansion was to expand the existing mobile home park.²⁸ Bedford Township, the defendant, denied the plaintiff's request and filed suit, challenging the denial.²⁹

In 1995, the parties eventually settled and submitted a consent judgment with the Trial Court.³⁰ Paragraphs 1-9 of the consent judgment specifically addressed the zoning for the 11-acre parcel that was originally at issue.³¹ Paragraphs 10-13 addressed an unidentified property that would be purchased sometime in the future.³² The Court of Appeals voided provisions 10-13

²⁶ *Inverness, supra*, 250.

²⁷ *Inverness, supra*, 243.

²⁸ *Inverness, supra*, 243.

²⁹ *Inverness, supra*, 243.

³⁰ *Inverness, supra*, 243.

³¹ *Inverness, supra*, 243.

³² *Inverness, supra*, 243-244.

because the same improperly infringed upon the “legislative authority of a future township board.”³³

Paragraph 10 of the consent judgment states, in part, that,

“Defendant...agree to amend the Bedford Township Master Plan, adopted in July 1993, to master plan another parcel of land in Bedford Township (hereinafter “the Future Property”) for a new manufactured home community development. The Future Property shall be located in the southeast quadrant of Bedford Township... shall not be less than 30 acres in size and not more than 100 acres in size, all of which property shall be contiguous; and shall not be located adjacent to land which is zoned R-1 on the June 1993 revision to the Bedford Township zoning district map.”³⁴

Paragraph 11 of the consent judgment states, in part, that,

“Plaintiffs shall have five (5) years...to locate and option the Future Property. The Township shall...confirm that the parcel meets the criteria for master planning set forth in paragraph ten (10) of this Consent Judgment. If so confirmed...the parcel identified by Plaintiffs shall automatically be deemed the Future Property referred to in this Judgment.”³⁵

Paragraph 12 of the consent judgment states, in part, that,

“The parties hereby stipulate and agree that, when the Future Property has been identified either through agreement of the parties...development of a licensed manufactured home community on the Future Property shall be a reasonable use of said property and consistent with the Master Land Use Plan...”³⁶

Paragraph 13 of the consent judgment states, in part, that,

“After the Future Property has been identified through agreement of the parties or through judicial determination, Defendant shall have four months to master plan the Future Property for manufactured home community development. Thereafter, Plaintiffs shall apply for rezoning of the Future Property.”³⁷

³³ *Inverness, supra*, 250. The Court did not void the zoning controls in paragraphs 1-9.

³⁴ *Inverness, supra*, 243.

³⁵ *Inverness, supra*, 243-244.

³⁶ *Inverness, supra*, 244-245.

³⁷ *Inverness, supra*, 245.

In June, 2000, the plaintiff's located a parcel of land it felt met the requirements of the consent judgment.³⁸ This parcel was not the 11 acres that was subject to the consent judgment.³⁹ Bedford Township objected to the parcel, claiming that it "failed to satisfy the consent judgment criteria in several aspects."⁴⁰ The plaintiff asked for a rehearing and asked for relief from the consent judgment.⁴¹ On January 17, 2001, the Trial Court held that "...the parcel met the criteria of the consent judgment."⁴² Bedford Township asked for a re-hearing, seeking relief from the consent judgment because it "constituted an improper delegation of its legislative powers."⁴³ In other words, Bedford Township argued that the 1995 consent judgment improperly infringed upon its legislative zoning authority by binding future boards because paragraph 12 required the parties to agree that a manufactured home community must be a reasonable use and consistent with the Master Land Use Plan for a future, unidentified parcel of land. The plaintiff argued to the contrary, that the consent judgment did not contract away any legislative powers.⁴⁴

The Trial Court granted Bedford Township's request for a re-hearing and held that paragraphs 10 through 13 of the consent judgment "operated to disenfranchise voters and inappropriately bind future township boards, and therefore, these provisions of the consent judgment were void as against public policy."⁴⁵ The Trial Court subsequently vacated

³⁸ *Inverness, supra*, 245.

³⁹ *Inverness, supra*, 243.

⁴⁰ *Inverness, supra*, 245.

⁴¹ *Inverness, supra*, 245.

⁴² *Inverness, supra*, 245.

⁴³ *Inverness, supra*, 245.

⁴⁴ *Inverness, supra*, 245.

⁴⁵ *Inverness, supra*, 245-246.

paragraphs 10 through 13 of the consent judgment.⁴⁶ Plaintiff appealed the Trial Court's decision to the Court of Appeals.⁴⁷

In *Inverness*, the Court held that “[t]he power to zone and rezone property is a legislative function.”⁴⁸ The Court of Appeals reasoned that “...while a township board may, by contract, bind future boards in matters of a business or proprietary nature, a township board may not contract away its legislative powers. “The true test is whether the contract itself deprives a governing body, or its successor, of a discretion which public policy demands should be left unimpaired.”⁴⁹

In *Inverness*, the Court of Appeals determined that a consent judgment directing that the master plan be amended by a future township board to permit manufactured housing improperly contracts away the legislative powers of a future board.⁵⁰ The Court of Appeals concluded that the obvious intent of the agreement was legislative in nature.⁵¹ The Court of Appeals pointed to paragraph 10 and 12 of the consent judgment noting that it requires the amendment of the master plan to “provide for a new manufactured home community development and paragraph 12...provides that a future use consistent with the master plan is deemed reasonable.”⁵² The Court of Appeals concluded that the language regarding “future use that limits future boards from making determinations about what is reasonable deprives future boards from ‘discretion which public policy demands should be left unimpaired.’”⁵³ Consequently, the Court of Appeals voided paragraphs 10 through 13 of the consent judgment because the limitations on the

⁴⁶ *Inverness, supra*, 246.

⁴⁷ *Inverness, supra*, 246.

⁴⁸ *Inverness, supra*, 247.

⁴⁹ *Inverness, supra*, 248.

⁵⁰ *Inverness, supra*, 248.

⁵¹ *Inverness, supra*, 249.

⁵² *Inverness, supra*, 249.

⁵³ *Inverness, supra*, 248.

amendment of the master plan “constitute an improper infringement of the legislative authority of a future township board.”⁵⁴

Amicus Curiae agrees with the Court of Appeal’s analysis and holding when it decided *Inverness*, but submits that there are substantial factual and legal differences that separate *Inverness* from the case at bar. In *Inverness*, the parties agreed to rezone a future, unidentified parcel of land within five years of signing the consent judgment.⁵⁵ Moreover, the future parcel in *Inverness* was not part of the 11 acres that was actually at issue in the underlying litigation. Under this premise, Amicus agrees that contracting local units cannot enter into a PA 425 agreement where a provision requires a municipality to enter into a future PA 425 agreement on a future, unidentified parcel of land located elsewhere within that municipality. That would be the proper analogy.

In the case at bar, the contracting Townships entered into a 425 agreement to transfer certain property from Clam Lake Township to Haring Charter Township. Contained within that Agreement were provisions regulating the proposed zoning of the Transferred Area. The Agreement at issue does not regulate or attempt to regulate any future or unidentified lands located beyond the boundaries of the Transferred Area.

It is important to recognize the context of *Inverness*. The litigation in *Inverness* was under the Michigan Zoning Enabling Act and this Act provides no provisions that allow local units to contract away their legislative zoning ordinance authority. But this is not where the analysis ends for the case at bar because Article 7, Section 28 of the Michigan Constitution of 1963 does in fact allow local units to contract away legislative authority as allowed by law. Additionally, the State has plenary authority to create other laws that allow municipal contracts

⁵⁴ *Inverness, supra*, 250.

⁵⁵ *Inverness, supra*, 243-344.

controlling zoning or other police powers unless prohibited by the Constitution. PA 425 is an implementation of Article 7, Section 28 and the valid exercise of the state's plenary legislative powers to allow for local units to contractually transfer away and bind boards regarding adoption of ordinances and other legislative functions (i.e. power to tax). It creates an exception to the general rule in *Inverness*.

The Court of Appeal's panel in *Inverness* did not consider PA 425 because there was no reason to; it was outside the scope of the facts and issues presented by the parties. In *Inverness*, the fact pattern provided no legal basis allowing Bedford Township to contract away its legislative zoning authority. There was no constitutional mechanism or statutory implementation that authorized Bedford Township to contract away its legislative authority sometime in the future, when plaintiff identified it, and require that it be zoned pursuant to the terms of the consent judgment.

In the case at bar the Transferred Area comes under Haring Charter Township's sole jurisdiction, "***unless the contract specifically provides otherwise.***"⁵⁶ The contracting municipalities agreed to a zoning plan for the Transferred Area when the Agreement was negotiated. Article I, Section 6 of the Agreement⁵⁷ is a contracted provision creating a zoning scheme for the Transferred Area. Amicus Curiae submits that controlling the zoning in the Transferred Area ensures that the proposed economic development project comes to fruition as planned.⁵⁸ For example, a transferor municipality may transfer a parcel of land along with full jurisdiction for water and sewer infrastructure for a proposed economic development project to

⁵⁶ MCL 124.28.

⁵⁷ Appellants' Appendix, page 480a-485a.

⁵⁸ Of course, there is a risk that this type of authority could be abused; however, the Legislature in PA 425 has limited its application to conditional transfers of land for economic development projects.

construct a strip-mall to service a nearby neighborhood. However, the transferor may want to negotiate minimum zoning requirements so the property can only be developed as the proposed strip-mall and not leave the zoning open in the Transferred Area for a slaughterhouse.

Furthermore, PA 425 unequivocally authorizes the contracting municipalities to consider land area and **land uses** as relevant factors when formulating its PA 425 agreement to achieve the proposed economic development project.⁵⁹ There is no question that zoning districts regulate land use. The contracting Townships considered the proposed land use of the Transferred Area and determined that a zoning scheme provision was necessary to achieve that end. The contracting Townships exercised statutory authority when they mutually agreed to the zoning provisions contained in original Agreement.⁶⁰ The Agreement provisions governing adoption of ordinance provisions regarding zoning were specifically authorized in MCL 124.26(c). This provision will be addressed in the following argument.

PA 425 is the Legislature's implementation device intended to create an exception to the general rule that prohibits contracting municipalities to contract away legislative authority. The contracting Townships exercised proper statutory authority when formulating and devising zoning scheme provisions contained in the Agreement. For these reasons, Amicus Curiae submits to this Honorable Court, that the facts and law being analyzed in *Inverness* are drastically different than those of the case at bar; and therefore, the *Inverness* case's holding and reasoning does not apply to the Townships' Agreement regarding provisions that control, in part, Haring Charter Township's legislative zoning authority in the Transferred Area.

The very spirit of PA 425 binds future township boards up to one-hundred years to the language contained within the contracted PA 425 agreement.

⁵⁹ MCL 124.2s(a).

⁶⁰ Appellants' Appendix, page 292a-327a.

2. THE CHALLENGED PROVISIONS OF THE 425 ACT AGREEMENT WERE NEVERTHELESS AUTHORIZED BY SECTION 6(C) OF ACT 425, MCL 124.6(C).

A STANDARD OF REVIEW

Issues addressed herein involve questions of constitutional and statutory interpretation which are reviewed de novo.⁶¹

B. SECTION 6(C) OF PA 425 APPLIES TO THE CONTRACTING MUNICIPALITIES AGREEMENT

Section 6(c) is unambiguous. The State exercised its plenary power by enacting PA 425 for conditional land transfer for economic development purposes. Section 6(c) states,

“If applicable to the transfer, a contract under this act may provide for any of the following:

(c) [t]he fixing and collecting of charges, rates, rents, or fees, where appropriate, and the ***adoption of ordinances and their enforcement*** by or with the assistance of the participating local units.”⁶² (emphasis added)

This Honorable Court should consider the language of the plain language of Section 6(c) when determining its intent. "The primary goal of statutory interpretation is to give effect to the intent of the Legislature."⁶³ "The first step in that determination is to review the language of the statute itself."⁶⁴ "If the statute is unambiguous on its face, the Legislature will be presumed to have intended the meaning expressed and judicial construction is neither required nor permissible."⁶⁵ Courts “must give effect to every word, phrase, and clause in a statute and avoid

⁶¹ *Associated Builders & Contractors v. City of Lansing*, 499 Mich 177, 183; 880 NW2d 765 (2016).

⁶² MCL 124.26(c)

⁶³ *In re: MCI Telecommunications*, 460 Mich 396, at 411; 596 NW2d 164 (1999).

⁶⁴ *In re: MCI Telecommunications*, *supra*, 411.

⁶⁵ *In re: MCI Telecommunications*, *supra*, 411.

an interpretation that would render any part of the statute surplusage or nugatory.”⁶⁶ Courts “interpret th[e] words in [the statute in] light of their ordinary meaning and their context within the statute and read them harmoniously to give effect to the statute as a whole.”⁶⁷

PA 425 unequivocally and unambiguously authorizes the contracting municipalities to adopt and enforce any ordinances that are part of the negotiated PA 425 agreement. Section 6(c) permits for the contract to dictate adoption of ordinances which by its very nature would bind legislative authority in that regard during the term of the 425 Agreement. Simply put, the contracting Townships exercised the Legislature’s implementation device (PA 425) when they agreed to a zoning scheme that will regulate the Transferred Area. The plain language of Section 6(c) explicitly authorized the contracting townships to negotiate provisions specifically addressing the adoption of zoning ordinances and enforcement of the same. A zoning ordinance is an “ordinance”.

The plain language of Section 6 clearly intends to be the Legislature’s implementation device that authorizes municipalities to enter into contracts that transfer the administration of any function or power to further achieve the goal of the economic development project. Therefore, the contracted zoning scheme may be adopted by Haring Township and the same may enforce any bargained ordinance(s) on the Transferred Area.

Appellee’s brief on appeal argues that there is no authority in Act 425 or any other Michigan statute that permits one township to contract away its legislative zoning power to another township.⁶⁸ This statement ignores the plain language of Section 6 of Act 425. Appellee merely repeats dogma and fails to recognize the legislature’s plenary authority to alter the

⁶⁶ *Johnson v Recca*, 492 Mich 169, 177; 663 NW2d 520 (2012) citing *State Farm Fire & Cas. Co. v. Old Republic Ins. Co.*, 466 Mich. 142, 146; 644 N.W.2d 715 (2002).

⁶⁷ *Johnson, supra*, 177 citing *People v. Peltola*, 489 Mich. 174, 181; 803 N.W.2d 140 (2011).

⁶⁸ Appellee’s Brief on Appeal, page 37.

general rule by creation of Act 425 and the application of Article 7, Section 28 of the Michigan Constitution.

Appellee argues that if the legislature intended to allow for contracting zoning in a PA 425 agreement “it would have actually said so.”⁶⁹ The plain language of Section 6(c) allows the contract to require “the *adoption of ordinances and their enforcement* by or with the assistance of the participating local units.”⁷⁰ If the legislature intended to address only police power and not zoning ordinances it would have said so. There is no distinction among the types of ordinances in Section 6(c). The Legislature specifically and unambiguously enacted statutory language authorizing contracting local units to negotiate the adoption of ordinances in the PA 425 agreement. Appellee’s claim is misguided when it argues that “[t]here is simply no authority, either express or implied in any...statute...that would allow one township to bind another in the exercise of its zoning authority.”⁷¹ Appellee’s attempt to narrowly construe PA 425 violates the principles of construction in Article 7, Section 34 of the Michigan Constitution (i.e. liberally construed).

3. THE OFFENDING PROVISIONS OF THE DEFENDANT TOWNSHIPS’ ACT 425 AGREEMENT WERE SEVERABLE IF THE CHALLENGED PROVISION ARE VOID.

A. STANDARD OF REVIEW

Issues of contract interpretation are questions of law that are subject to a *de novo* standard of review.⁷²

⁶⁹ Appellee’s brief on appeal, page 41.

⁷⁰ MCL 124.26(c)

⁷¹ Appellee’s Brief on Appeal, page 42.

⁷² *In re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008).

“When effectuating the intentions of parties to an unambiguous contract, the court looks only to the unambiguous terms of the contract and the intention expressed therein.”⁷³ When determining the intent of the parties to a contract:

“[i]t must not be supposed ... that an attempt is made to ascertain the actual mental processes of the parties to a particular contract. The law presumes that the parties understood the import of their contract and that they had the intention which its terms manifest. It is not within the function of the judiciary to look outside of the instrument to get at the intention of the parties and then carry out that intention regardless of whether the instrument contains language sufficient to express it; but their sole duty is to find out what was meant by the language of the instrument.”⁷⁴

The severability provision is unambiguous, so this Honorable Court should only look to the four corners of the document to determine the Townships’ intent and not accepted any extrinsic evidence.

B. THE CHALLENGED PROVISIONS ARE SEVERABLE.

Article I, Section 6 of the Agreement⁷⁵ is severable even if this Honorable Court finds that the Townships’ zoning scheme is invalid. The Townships’ 2nd Amended Agreement, Section 2(d), dated May 8, 2013, includes a Savings Clause/Severability. The Townships agreed that,

“Savings/Severability Clause. If a court or administrative agency of competent jurisdiction finds that the zoning provisions of this Section 6 are invalid for reason of constituting an unlawful infringement or restriction upon Haring’s legislative zoning authority, then Haring and Clam Lake agree as follows:

(i) Upon such a finding, Section 6 shall, automatically and without further action by the parties, be interpreted and applied as requiring only that Haring comply with Section 504(3) of the Michigan Zoning Enabling Act, MCL 125.3504(3), when Haring receives a request for approval of a mixed-used commercial/residential PUD on the undeveloped portion of the Transferred Area. The parties intention is that Haring’s compliance with said statute will promote the type of planning “economic development project” that is envisioned by Section 3 of this Agreement.

⁷³ *Zurich Ins Co v CCR & Co*, 226 Mich App 599, 605; 576 NW2d 392, 396 (1997)

⁷⁴ *Zurich*, surpa, 603-604.

⁷⁵ Appellants’ Appendix, page 480a-485a.

(ii) Such a finding shall not invalidate the other provisions of this Agreement, which shall remain binding and fully enforceable, in concert with Art. I, Section 6.d(i).”

Even if this Honorable Court severs Article I, Section 6 from the Agreement⁷⁶, an economic development project still exists. The proposed economic development project is highlighted in Section 1, paragraph 3 of the 2nd Amended Agreement for Conditional Transfer. Section 1, paragraph 3 provides that,

“3. Economic Development Project

The Transferred Area is currently used, in part, for existing residential housing, and the balance is currently undeveloped. The Transferred Area is proposed for the implementation of an economic development project under Act 425, with said economic development project consisting of two aspects, as follows: (a) the construction a mixed-use, commercial/residential development that is designed and constructed in accordance with principles of planned unit development and the recommendations of the Cadillac Area Corridor Study (September 1999), in order to balance the property owners’ desire for commercial use with the need to protect the interests of surrounding residential property owners; and, (b) the provision of public waste water and public water supply services to the Transferred Area, so as to foster the new mixed-use, commercial/residential development and to provide for the protection of the environment, including, but not limited to, protection of ground water and surface water on and below the Transferred Area.”

The Michigan Court of Appeals has held that when considering “whether a contractual provision is severable, it is clear that the primary consideration is the intention of the parties.”⁷⁷ Furthermore, “[t]he failure of a distinct part of a contract does not void valid, severable provisions.”⁷⁸ This Honorable Court should determine the contracting Townships’ intent “by examining the language of the contract according to its plain and ordinary meaning.”⁷⁹ “In doing

⁷⁶ Appellants’ Appendix, page 480a-485a.

⁷⁷ *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 641; 534 NW2d 217, 220 (1995).

⁷⁸ *Samuel*, *infra* at 614.

⁷⁹ *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 174; 848 NW2d 95 (2014).

so, we avoid an interpretation that would render any portion of the contract nugatory.”⁸⁰ To determine contract interpretation, a Court should “give effect to the parties’ intention at the time they entered into the contract.”⁸¹ “If the contractual language is unambiguous, courts must interpret and enforce the contract as written because an unambiguous contract reflects the parties’ intent as a matter of law.”⁸² There are two factors that should be considered when determining a contracting party’s intent: “whether the two or more promises or parts of the contract are so interdependent or interwoven that the parties must be deemed to have contracted only with a view to the performance of both, and would not have entered into one without the other”; and second, whether the consideration for the several promises can be apportioned among them without doing violence to the contract or making a new contract for the parties.”⁸³

The zoning scheme provision is not so interdependent or interwoven to the point that the Townships would not have entered into a PA 425 transfer agreement without it. At its core, the Agreement concentrates on an economic development project. PA 425 assumes that conditionally transferred property will be under the jurisdiction of the transferee jurisdiction, “[u]nless the contract specifically provides otherwise.”⁸⁴ (Emphasis added). Even if this Honorable Court severs the challenged zoning scheme from the Agreement⁸⁵, the goal of the economic development project may still be accomplished strictly though Haring Charter Township’s zoning jurisdiction.

The Transferred Area ultimately needs to be zoned to accommodate a mixed-use PUD, but nothing in the Agreement suggests that this goal cannot be accomplished even if the

⁸⁰ *Miller-Davis*, supra, 174.

⁸¹ *Miller-Davis*, supra, 174.

⁸² *Hastings Mut Ins Co v Safety King, Inc*, 286 Mich App 287, 292; 778 NW2d 275 (2009).

⁸³ Court of Appeals Opinion, page 4-5, citations omitted.

⁸⁴ MCL 124.28.

⁸⁵ Appellants’ Appendix, page 480a-485a.

challenged provisions are struck down. Furthermore, there is no evidence that the contracting Townships would not have entered into the Agreement if Haring Charter Township refused to contract away its legislative zoning powers. In fact, the Agreement contemplates severability might occur and the Townships still entered into the Agreement with the goal of accomplishing the proposed economic development project. Therefore, the Agreement's challenged provisions are divisible.

It is clear that the contracting Townships intended that Article 6, Section 1⁸⁶ be severable if a Court determined that this provision impermissibly contracts away Haring Charter Township's legislative zoning authority. That is the precise reason why the Townships adopted and 2nd Amendment to the Agreement.⁸⁷ The Townships wanted to continue the economic development project even if the challenged provisions were severed. The 2nd Amendment to the Agreement for Conditional Transfer contains the severability provision that was signed by the each respective township supervisor and clerk, thereby memorializing in writing the Townships' intent to sever these provisions from the Agreement if the Court finds the same invalid. The Townships' could have agreed to rescind the entire Agreement if Article I, Section 6 was invalid if that was their intent. But, that was not the case because the Townships never intended the entire Agreement to be defeated. It is unequivocally obvious that the Townships intended to be bound by the remaining provisions of the Agreement even if Article 6, Section 1⁸⁸ was invalidated.

Assuming the challenged provisions are severed, the remaining terms of the Agreement require that the Transferred Area will be conditionally transferred into Haring Charter

⁸⁶ Appellants' Appendix, page 480a-485a.

⁸⁷ Appellants' Appendix, page 480a-485a.

⁸⁸ Appellants' Appendix, page 480a-485a.

Township's jurisdiction. Haring Township will have full authority and discretion to zone the Transferred Area as it sees fit in order to accommodate the proposed economic development project. A mixed-use PUD cannot be placed on a parcel unless the same is zoned for that type of use. It will be Haring Township's responsibility to determine the zoning district for the Transferred Area in order to accommodate the proposed economic development project because the Transferred Area is solely in Haring Township's zoning jurisdiction.

CONCLUSION

For the reasons set forth above, Amicus Curiae respectfully requests this Honorable Court to reverse the Court of Appeals opinion and hold that the general rule in *Inverness* establishing that townships cannot contract away their legislative authority does not apply to the Townships' Agreement under PA 425. Furthermore, Section 6(c) authorizes the bargaining Townships to contract provisions regarding ordinance adoption that they determine are necessary to complete the economic development project. Lastly, Amicus Curiae respectfully requests this Honorable Court to hold that even if the challenged provisions of the 2nd Amendment to Agreement for Conditional Transfer are severed, the remaining provisions of the Agreement are still enforceable and the contracting Townships may continue to work towards successfully completing the proposed economic development project under their PA 425 Agreement.

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